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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

Competitive Bidding for
Mutually Exclusive
Broadcast Applications

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 97-234
GC Docket No. 92-52
GEN Docket 90-264

COMMENTS OF JOHN ANTHONY BULMER

John Anthony Bulmer ("Bulmer"), by his attorney, respectfully files these comments on matters raised in the Commission's Notice of Proposed Rule Making, FCC 97-397, released November 26, 1997. Bulmer is an applicant for new FM stations at North Kingsville, Ohio, (Channel 298A) and at North Madison, Ohio, (Channel 229A), File Nos. BPH-950509MA and BPH-930121MG, respectively, both of which are mutually exclusive with one or more other applications. He thus has a direct interest in the outcome of this proceeding.

Mr. Bulmer has served the public interest as a licensee of commercial radio stations for over 20 years. He has provided needed first local services to a number of communities, applying for construction permits and subsequently constructing and operating stations whose allotments had failed to generate any applications during the window filing period. He is personally responsible for fulfilling the only FM allotments to Royal Center, Indiana, North Baltimore and Edgewood, Ohio, and Lake Luzerne, New York. He was also instrumental in the Commission's denial of an application to extend an unbuilt construction permit for a new FM station at Ashtabula, Ohio. As a result, Mr. Bulmer

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has become well-versed in the Commission's rules regarding broadcast stations, including its requirements for applications for new stations.

In these Comments, Mr. Bulmer urges the Commission to allow only qualified applicants to participate in an auction among mutually exclusive broadcast applicants. This is a matter of great significance, not only to him, but also to many other applicants¹. The public interest will be best served by the Commission ensuring to the extent possible that only fully qualified applicants are allowed to bid at auction for new stations, particularly with regard to those applications which were filed prior to the passage of the Balanced Budget Act of 1997. Such pending applications must, at a minimum, meet the present threshold requirements for tenderability and acceptability. Further, the Commission should accept petitions to deny applications prior to the auction, and if they make a prima facie case, conduct a prompt hearing on the applicant's qualifications. This will expedite service to the public, for clearly deficient applicants would not be permitted to go through the auction only to have the Commission hold hearings afterwards, possible resulting in inordinate delays in getting service to the public. If applicants' basic qualifications are evaluated prior to the auction, the Commission, as well as the public, will have greater

¹ For example, the applicants for a new FM station at Round Rock, Texas, MM Docket 90-608, two of whom face disqualifying issues which have been tried in hearing, but without an initial decision, would be affected by the Commission's ultimate determination of this issue.

confidence that the winning bidder will be qualified to receive a construction permit.

Applications which were filed when Commission procedures called for staff review for tenderability and acceptability defects should continue to meet these minimum requirements. The passage of the amendment to the Act calling for auctions in lieu of comparative hearings does not suggest the Commission ignore the processing procedures in place when applications were filed. It is fundamentally unfair to permit unqualified applicants to proceed to auction on an equal footing with fully qualified applicants who followed the Commission's rules in good faith. cf. Orion Communications, Limited v. FCC, Case No. 96-1430, (decided December 19, 1997), where the Court of Appeals for the D.C. Circuit was troubled by the Commission's authorizing an interim broadcast operation composed of several entities who had each been found unqualified.

The Act itself mandates that only qualified applicants be permitted to participate in an auction. New Section 309(j)(6)(e) states that the Commission continues to have the obligation to, inter alia, use threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity. Basic qualifications, including, but not limited to, tenderability and acceptability requirements, fall within the Act's specification of "threshold qualifications."

It is only equitable that applicants be responsible for compliance with the Commission's filing procedures. Deficient

applications should not be "let off the hook" by the fortuitous passage of the new legislation authorizing auctions. Defective applications which merit dismissal under the Commission's processing guidelines, or which are filed by unqualified applicants, should continue to be treated as unacceptable, and dismissed or denied.

Mr. Bulmer's experience with the mutually exclusive North Kingsville applications is relevant to this point. In 1995, the Commission added Channel 298A to North Kingsville, Ohio. As this station would serve Mr. Bulmer's home in Ashtabula, Ohio, he decided to seek the construction permit. He diligently prepared estimated budgets for station construction and first 3-months operation, and secured reasonable assurance of a bank loan to meet his estimated costs. He also located an appropriate transmitter site, paying for a written option to acquire the property. Due to the Commission's inaction on his application, the original option period expired and he has had to extend it at an additional monetary cost.

Three other parties filed applications for the North Kingsville facility: Phillip Cantagallo, an individual; Antoinette Palmer, also an individual, and Robert M. Winters and Constance Capp Winters, dba North Kingsville Broadcasting, a husband-and-wife partnership. From time-to-time after the applications had been filed, Mr. Bulmer would contact each of the other applicants in an attempt to settle the case. The Commission's limitation on settlement payments, Section 73.3525 of its rules, coupled with

its moratorium on processing such applications,² tended to reduce the applicants' incentive to enter into settlement agreements. He was unable to reach a comprehensive agreement to settle the proceeding.

However, with the passage of the 1997 Act and the temporary lifting of payment limitations to withdrawing applicants, Mr. Bulmer began again to negotiate with the competing applicants. He recently executed agreements with both Ms. Palmer and North Kingsville Broadcasting calling for the dismissal of their applications in return for monetary payments. Petitions requesting approval of these agreements are now pending before the Commission.

However, Mr. Bulmer has been unable to settle with the remaining applicant, due at least partially to its unique status. Phillip Cantagallo passed away in November 1996. Emily Chismar, who is unrelated to Mr. Cantagallo to the best of Mr. Bulmer's knowledge, received approval of the probate court to take Mr. Cantagallo's place as the applicant in April 1997. Yet she did not advise the Commission of her intention to replace Cantagallo until June 6, 1997, when she submitted an amendment to this application. However, this amendment failed to provide the minimum amount of information required of applications; it even lacked Chismar's address and telephone number. As a result, the

² The North Kingsville applications have not as yet been accepted for tender, a preliminary step which would generally occur within a matter of weeks after the close of the filing window prior to the Bechtel decision.

application was then subject to dismissal, pursuant to Section 73.3564 of the rules which mandates the dismissal of applications which lack certain minimum information.

Furthermore, Mr. Bulmer has discovered significant additional flaws in the application, any of which would result in the application being dismissed were the processing line reviewing applications for new stations under the Commission's current rules. Cantagallo's application lacks a viable transmitter site and was both incomplete and inaccurate for over a year. Either of these defects would have resulted in the dismissal of the application.³

Later, in response to requests that the Commission dismiss the application, Chismar asserted that she did not have to amend any question for which the answer given by Mr. Cantagallo had not changed. In her June 6 amendment she gave no reason for failing to provide the basic information required of all applicants. She failed to disclose her citizenship, any criminal background, or whether she controlled other broadcast stations. Further, she failed to address such necessary items as transmitter site assurance, including the name and telephone number of the landowner, and financial qualifications.

Chismar provided no explanation for her failure to provide the necessary information, nor did she seek a waiver in her June

³ The information concerning the defects in Cantagallo's application, summarized herein, is presently before the Commission in pleadings Mr. Bulmer directed to the Mass Media Bureau and responded to by Ms. Chismar.

6 amendment. Chismar's amendment failed to meet even the low threshold set by Section 73.3564: had the information contained in the amendment been filed as an initial application, it would have been dismissed.

Recognizing the gross deficiency in Cantagallo's application resulting from the dearth of information regarding the applicant then on file, Antoinette Palmer opposed Chismar's June 1997 amendment and requested dismissal of the application on July 26, 1997. It was in response to this filing that Chismar argued that she did not have to provide the information called for by Form 301. In fact, she did not provide additional information at that time. Only in her filing of November 14, 1997, did Chismar state that her June 6, 1997, amendment adopted all information on Cantagallo's application other than those items specifically changed in that amendment. As Chismar did not address the transmitter site certification, or the name and telephone number of the site owner, in her June 6, 1997, amendment, she must be said to have certified that she had reasonable assurance of the use of that site. She also certified that the name and telephone number of the site owner was the same as appears on Cantagallo's original application.

In the late summer and fall of 1997, Bulmer investigated the continuing accuracy of the certifications contained in Cantagallo's (now Chismar's) application. He learned that McEwen purchased the proposed transmitter site in November 1996. Mr. Bulmer learned directly from Ms. McEwen that she had never been

contacted by Emily Chismar, and further that she does not desire a radio tower on her property.

On October 31, 1997, Mr. Bulmer advised Chismar, through her communications counsel, that the land had been sold about a year previously. Only after that conversation did Chismar look into the ownership of the proposed transmitter site. She eventually contacted Ms. McEwen. Chismar learned that McEwen would not make her land available for a radio station tower on approximately November 20, 1997; yet it was not until January 8, 1998, approximately 49 days later, that Chismar filed an amendment to her application to specify a new transmitter site.⁴ Mr. Bulmer has objected to this amendment on the basis that an applicant is not permitted to change its transmitter site when it lacked reasonable assurance of its initial site, even when the amendment is submitted during the "amendment of right" period.

The Commission has taken no action on the objections to Chismar's amendments or on Mr. Bulmer's motion to dismiss Cantagallo's application. Moreover, the Commission's proposal is to defer review of the application until after the auction, and then review it only if it submits the winning bid. This approach is inequitable to the applicants and disserves the public interest by permitting a clearly unqualified applicant to delay a final resolution of the mutual exclusivity.

Mr. Bulmer had only a short period of time in which to

⁴ In the same amendment, Chismar seeks to substitute a wholly-owned limited liability company, EWC Enterprises, Ltd., as the applicant.

prepare his application for Channel 298A at North Kingsville. The allotment of Channel 298A was effective April 10, 1995, and the filing window closed in May 1995. By that date, he had to have a complete application, including the engineering portion (Section V-B), legal, and financial material. Chismar did not submit an application during that filing window; she demonstrated no interest in the station until after Mr. Cantagallo's death.

However, even after deciding to replace Mr. Cantagallo as the applicant, Chismar took much more time than was provided the initial applicants to even advise the Commission of her intent to assume Mr. Cantagallo's position in the application; as noted above, she received approval of the probate court on April 23, 1997, but did not file any amendment to advise the Commission of the substitution until June 6, 1997. Preparing that amendment took much less work than preparing the initial application. She did not submit an engineering section, and there is no indication that she prepared a budget or otherwise addressed her financial qualifications. In fact, the letter of November 6, 1997, from Marta McEwen to Emily Chismar, which was drafted by Chismar, first provides a figure for the rental of the site.⁵ It goes on to state, "This is to provide you with a basis for preparing your budget." Clearly, Chismar had not prepared a budget prior to that date.

Moreover, Ms. Chismar did not even bother to determine

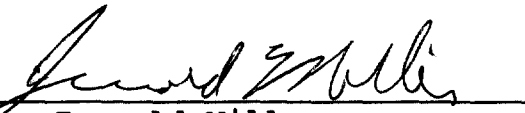
⁵ This letter was attached to Chismar's November 14, 1997, Opposition to Bulmer's Petition to Dismiss or Deny, and is attached hereto for convenience.

whether the transmitter site proposed in the application was available to her. Had she done so, she would have quickly learned that the land had been sold many months previously, and she would have contacted the new landowner. If Cantagallo's original application been filed without reasonable assurance of the transmitter site, it would have been summarily dismissed. There are no equities granting Ms. Chismar greater consideration.

The above example demonstrates that the Commission must adopt rules which do not allow an unqualified applicant, one who failed to follow the pertinent rules, to maintain an incomplete and grossly defective application. The finite number of applications on file prior to July 1, 1997, should be held to the qualification standards in place on that date. Unqualified applicants should be dismissed and not be rewarded for their refusal or inability to obey the Commission's processing standards by allowing them to participate in an auction.

Respectfully Submitted,

JOHN ANTHONY BULMER

By 
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January 26, 1998

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CERTIFICATE OF SERVICE

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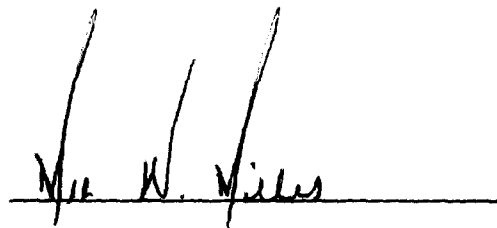
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